

N. 285-0

No. 14072

United States
Court of Appeals
for the Ninth Circuit

JOHN HENRY HACKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

NOV 20 1953

PAUL P. O'BRIEN
CLERK

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JOHN HENRY HACKER,

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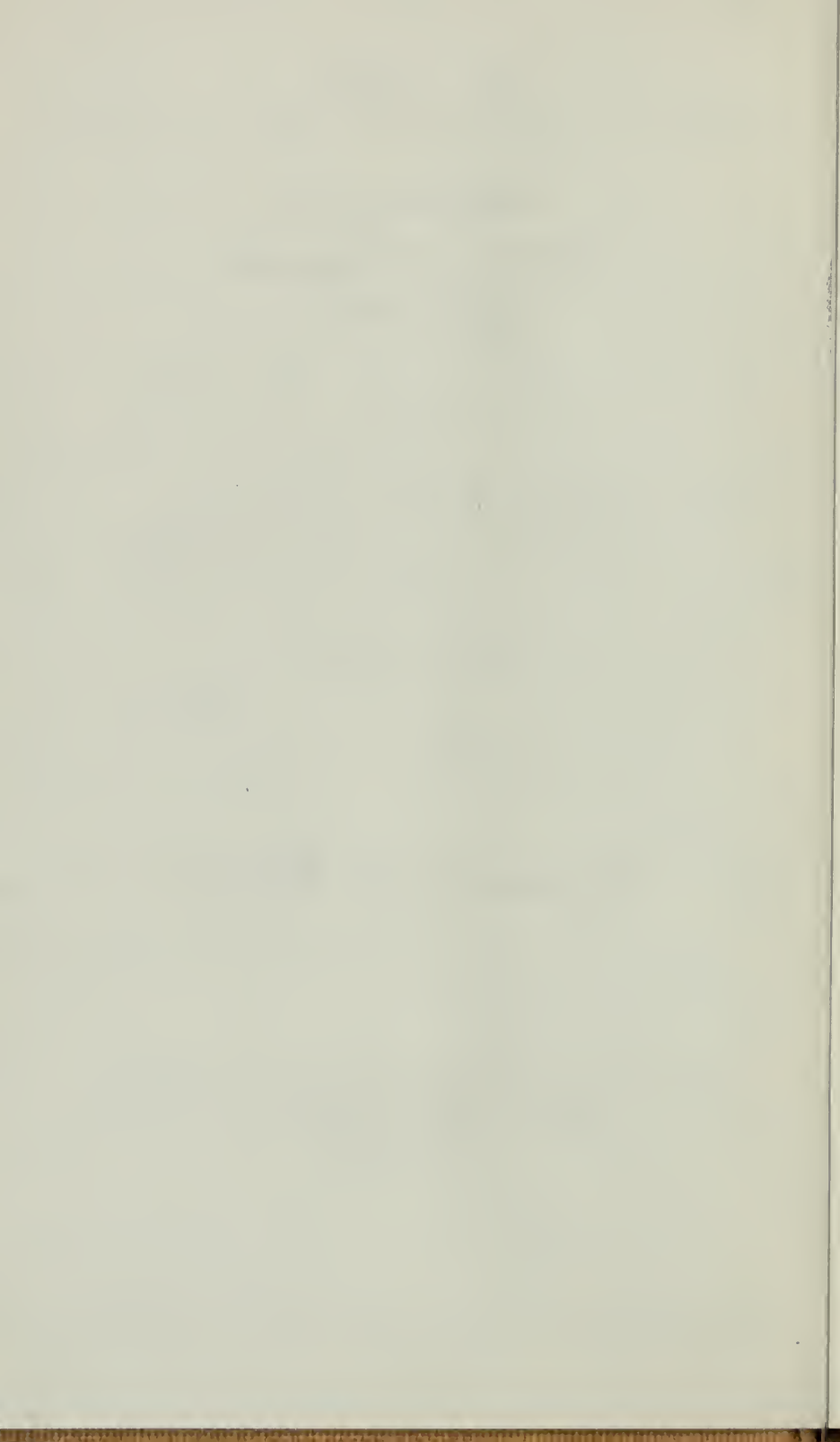
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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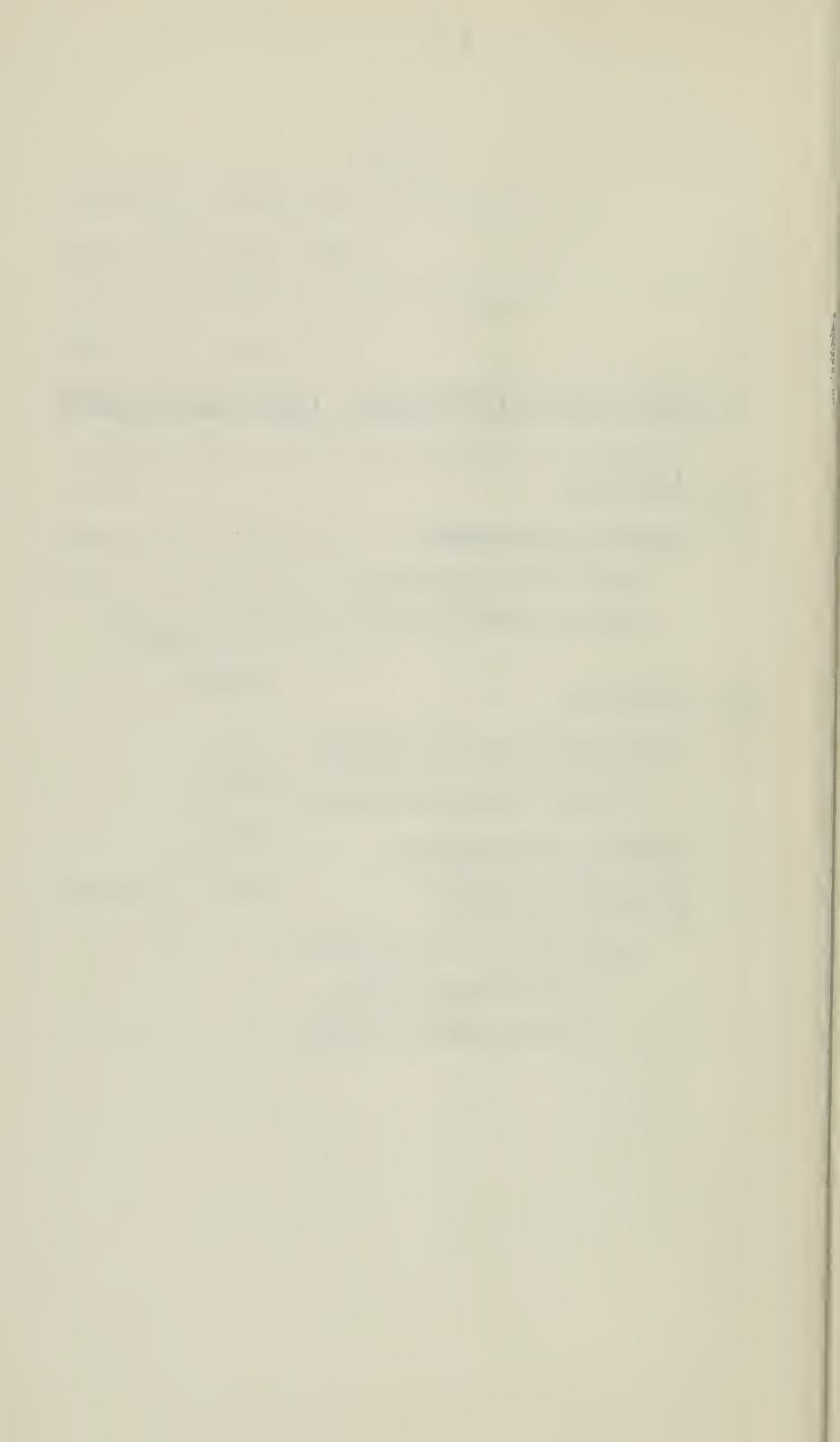
NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HAROLD SHIRE,
208 S. Beverly Drive,
Beverly Hills, Calif.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney,
RAY H. KINNISON,
MANUEL REAL,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.



In the United States District Court in and for
the Southern District of California, Central
Division

No. 22875CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN HENRY HACKER,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462—Universal Military Training and Service Act]

The grand jury charges:

Defendant John Henry Hacker, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 130, said board being then and there duly created and acting, under the Selective Service System established by said act, in San Bernardino County, California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on January 14, 1953, in Los Angeles County, California, in the

Central Division of the Southern District of California; and on or about January 14, 1953, in Los Angeles County, California, in the division and district aforesaid, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

/s/ WALTER S. BINNS,
United States Attorney.

A True Bill,

/s/ Indistinguishable,
Foreman.

ADM:AH

[Endorsed]: Filed May 20, 1953 [2*]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JUNE 1, 1953

Present: The Hon. Wm. M. Byrne,
District Judge.

Proceedings: For arraignment and plea.

Defendant is arraigned states his true name is John Henry Wilson and pleads not guilty as charged in the Indictment.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

It is ordered that this cause is set for trial July 28, 1953, 10 a.m. Jury waiver is filed.

EDMUND L. SMITH,
Clerk,

By /s/ EDW. F. DREW,
Deputy Clerk. [3]

[Title of District Court and Cause.]

WAIVER OF JURY

The above cause coming on regularly for trial, defendant being present with counsel, Harold Shire, Esq., and the defendant being desirous of having the case tried before the Court without jury, now requests of the Court that the case be so tried and hereby consents that the Court shall sit without a jury and hear and determine the charges against the defendant without a jury.

Dated: June 1, 1953.

/s/ JOHN HENRY HACKER,
Defendant in pro per.

I have advised the defendant fully as to his rights and assure the Court that his request for a trial without a jury is understandingly made.

/s/ HAROLD SHIRE,
Attorney for Defendant.

The United States Attorney consents that the request of the defendant be granted and that the trial proceed without a jury.

/s/ JAMES K. MITSUMORI,
Assistant U. S. Attorney.

Approved:

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed June 1, 1953. [4]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JUNE 22, 1953

Present: The Hon. Wm M. Byrne,
District Judge.

Proceedings: For hearing ex parte motion for permission for defendant to leave this jurisdiction pending trial July 28, 1953.

It is ordered that said motion is granted, and it is further ordered that trial is reset for Aug. 4, 1953.

EDMUND L. SMITH,
Clerk,

By /s/ EDW. F. DREW,
Deputy Clerk. [5]

[Title of District Court and Cause.]

MINUTES OF THE COURT—AUG. 4, 1953

Present: The Hon. Peirson M. Hall,
District Judge.

Proceedings: For trial.

It is ordered that this cause is assigned to Judge Ling for trial.

EDMUND L. SMITH,
Clerk,

By /s/ S. W. STACEY,
Deputy Clerk. [6]

[Title of District Court and Cause.]

MINUTES OF THE COURT—AUG. 4, 1953

Present: The Hon. Dave Ling,
District Judge.

Proceedings: For Court trial.

Gov't Ex. 1, and 1-A, are received into evidence.
Gov't rests.

Def't John Henry Hacker is called, sworn, and testifies in his own behalf.

Def't's Ex. A is received into evidence.

Def't rests. No rebuttal is offered.

Filed defendant's motion for judgment of acquittal.

It is ordered that cause be submitted and continued to Aug. 17, 1953, 1:30 p.m., for ruling.

EDMUND L. SMITH,
Clerk,

. By /s/ WM. A. WHITE,
Deputy Clerk. [7]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL

Comes Now the defendant, John Henry Hacker, by and through his counsel, and moves the court for a judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment.

2. The Government has wholly failed to prove a violation of the act and regulations by the defendant as charged in the indictment.

3. The undisputed evidence shows that the defendant is not guilty.

4. The denial of the claim for exemption as a minister is without basis in fact, arbitrary, capricious and contrary to law.

5. The denial of the ministerial status is illegal, arbitrary and capricious because the draft board employed artificial standards in determining what constitutes a minister [8] of religion within the

meaning of the act and regulations, and did not follow the definition of the term used in the act and regulations in determining the claim of the defendant as a minister of religion.

6. The denial of the ministerial status by the draft board was arbitrary and capricious because it illegally held that the defendant's ordination was not proper; that his following was not a regular following; that his training was not proper.

7. The denial of the exemption for ministerial status by the draft board was arbitrary and capricious because they held the performance of secular work by the defendant alone, without determining whether it was his avocation. They used this in order to defeat him of his ministerial status when the undisputed evidence showed that he is not engaged in secular work as a main business but only incidental to his main work of the ministry, and that according to the act and regulations he is regularly and customarily engaged in teaching and preaching the doctrines and principles of a recognized church, and is, in fact, the head of his congregation and the preacher for his congregation, and the evidence showed that the defendant pursued such preaching work as his vocation and did not preach incidentally to the performance of any secular work, and therefore the draft board order is illegal.

8. The undisputed evidence at the trial and the draft board records received into evidence show that there was a violation of procedural rights of the defendant before the local board on personal appearance because at the time he appeared before

the board they had their minds made up not to reconsider his case de novo but merely heard and listened to him with the intention of giving him the same classification so that he could appeal and thereby there was [9] no de novo classification by the local board upon personal appearance as though he had never been classified before, as required by Section 1624.2 of the regulations.

9. The undisputed evidence shows that upon the trial the draft board members were prejudiced and discriminated against the defendant because of his membership in a religious organization contrary to Section 1622.1 (d) of the regulations.

10. The local board deprived the defendant of procedural rights to a full and fair hearing before the board of appeals by failing to make an adequate and full written memorandum of the new additional oral evidence given by the defendant upon the occasion of his personal appearance, which new and additional oral evidence does not otherwise appear in the written papers sent to the board of appeals.

Respectfully submitted,

/s/ HAROLD SHIRE,

Attorney for Defendant.

[Endorsed]: Filed August 4, 1953. [10]

[Title of District Court and Cause.]

MINUTES OF THE COURT—AUG. 17, 1953

Present: The Hon. Dave W. Ling,
District Judge.

Proceedings: For ruling on motion for judgment of
acquittal.

It Is Ordered that cause is continued to Aug. 26,
1953, 1:30 p.m., for said proceedings.

EDMUND L. SMITH,
Clerk,

By /s/ P. D. HOOSER,
Deputy Clerk. [11]

[Title of District Court and Cause.]

MINUTES OF THE COURT—AUG. 26, 1953

Present: The Hon. Dave W. Ling,
District Judge.

Proceedings: For ruling on motion for judgment of
acquittal.

Court Orders said motion denied, and Finds de-
fendant guilty as charged in Indictment.

Court Orders cause referred to Prob. Officer for
investigation and report and continued to Sept. 8,

1953, 1:30 p.m., for sentence, and also for hearing motion for new trial.

EDMUND L. SMITH,
Clerk,

By /s/ P. D. HOOSER,
Deputy Clerk. [12]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

The defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The classification of the Selective Service Board, both local and on appeal, was arbitrary, capricious and illegal and there was no substantial basis upon which they could base the classification.

5. The denial of the ministerial status is illegal, arbitrary and capricious because the draft board employed artificial standards in determining what constitutes a minister of religion within the meaning of the act and regulations, and did not follow the

definition of the term used in the act and [13] regulations in determining the claim of the defendant as a minister of religion.

6. The denial of the ministerial status by the draft board was arbitrary and capricious because it illegally held that the defendant's ordination was not proper; that his following was not a regular following; that his training was not proper.

7. The denial of the exemption for ministerial status by the draft board was arbitrary and capricious because they held the performance of secular work by the defendant alone, without determining whether it was his avocation. They used this in order to defeat him of his ministerial status when the undisputed evidence showed that he is not engaged in secular work as a main business but only incidental to his main work of the ministry, and that according to the act and regulations he is regularly and customarily engaged in teaching and preaching the doctrines and principles of a recognized church, and is, in fact, the head of his congregation and the preacher for his congregation, and the evidence showed that the defendant pursued such preaching work as his vocation and did not preach incidentally to the performance of any secular work, and therefore the draft board is illegal.

8. The undisputed evidence at the trial and the draft board records received into evidence show that there was a violation of procedural rights of the defendant before the local board on personal appearance because at the time he appeared before the

board they had their minds made up not to reconsider his case de novo but merely heard and listened to him with the intention of giving him the same classification so that he would appeal and thereby there was no de novo classification by the local board upon personal appearance as though he had never been classified before, as required by Section 1624.2 of the regulations. [14]

9. The undisputed evidence shows that upon the trial the draft board members were prejudiced and discriminated against the defendant because of his membership in a religious organization contrary to Section 1622.1 (d) of the regulations.

10. The local board deprived the defendant of procedural rights to a full and fair hearing before the board of appeals by failing to make an adequate and full written memorandum of the new additional oral evidence given by the defendant upon the occasion of his personal appearance, which new and additional oral evidence does not otherwise appear in the written papers sent to the board of appeals.

Dated: August 26, 1953.

/s/ HAROLD SHIRE,
Attorney for Defendant.

[Endorsed]: Filed August 26, 1953. [15]

[Title of District Court and Cause.]

MINUTES OF THE COURT—Sept. 8, 1953

Present: The Hon. Dave W. Ling,
District Judge;

Proceedings: For hearing motion for new trial, and
For hearing report of Prob. Officer and sen-
tence.

Attorney Shire makes a statement in support of
motion for new trial.

Court orders said motion denied.

Attorney Real makes a statement.

Attorney Shire makes statement in behalf of de-
fendant.

Count Sentences defendant to two years' impris-
onment for offense charged in Indictment, and
grants stay of execution thereof until 5 p.m., Sept.
9, 1953.

Bail is exonerated.

EDMUND L. SMITH,

Clerk.

By /s/ MARY O. SMITH,

Deputy Clerk. [16]

United States District Court for the Southern District of California, Central Division

No. 22,875

UNITED STATES OF AMERICA,

vs.

JOHN HENRY WILSON, Charged as John Henry Hacker.

Criminal Indictment in one count for violation of U. S. C., Title 50, App., Sec. 462

JUDGMENT AND COMMITMENT

On this 8th day of September, 1953, came the attorney for the government and the defendant appeared in person and with counsel, Harold Shire.

It is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of having on or about January 14, 1953, in Los Angeles County, California, knowingly failed and neglected to perform a duty required of him under the Universal Military Training and Service Act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do, as charged in the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years in an institution to be selected by the Attorney General of the United States or his authorized representative for the offense charged in the Indictment.

It is Adjudged that execution be stayed until 5 p.m., September 9, 1953, and that bail of the defendant is exonerated.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVE W. LING,
United States District Judge.

[Endorsed]: Filed September 8, 1953. [17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: John Henry Hacker, 10806 Rose Avenue, Ontario, California.

Name and address of Appellant's attorney: Harold Shire, 208 So. Beverly Drive, Beverly Hills, Calif., Bradshaw 2-1854.

Offense: Violation, U. S. C. , Title 50, App., Section 462—Selective Service Act. 1948.

Defendant was found guilty on August 17, 1953, and was sentenced to a sentence of 2 years on Tuesday, September 8, 1953, by the Honorable David Ling:

Defendant is now on bail.

I, Harold Shire, appellant's attorney, hereby appeal to the United States Court of Appeals, Ninth Circuit, from the above stated judgment.

Dated: September 8, 1953.

/s/ HAROLD SHIRE,
Attorney for Appellant.

[Endorsed]. Filed September 8, 1953. [18]

In the United States District Court, Southern
District of California, Central Division

No. 22875-Criminal

Honorable Dave W. Ling, Judge Presiding.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN HENRY HACKER (Also Known as JOHN
HENRY WILSON),

Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,
United States Attorney, By
MANUEL REAL,
Ass't United States Attorney.

For the Defendant:

HAROLD SHIRE, ESQ.

Tuesday, August 4, 1953, 10:45 A.M.

(Case called by the clerk.)

Mr. Real: Ready for the Government, your Honor.

Mr. Shire: Ready for the defendants in both cases, your Honor.

Mr. Real: In the Case of John Henry Hacker, No. 22875, I have a photostatic copy of the Selective Service file of John Henry Hacker, also known as John Henry Wilson, and ask it be marked as Government's Exhibit 1 for identification.

Pursuant to a stipulation between the Government and the defendant through his attorney:

"It is Hereby Stipulated and Agreed by and between the United States of America, Plaintiff, and John Henry Hacker, Defendant, in the above-entitled matter, through their respective counsel, as follows:

"That it be deemed that the Clerk of Local Board No. 130 was called, sworn and testified that:

"1. She is a clerk employed by the Selective

Service System of the United States Government.

"2. The defendant, John Henry Hacker, is a registrant of Local Board No. 130.

"3. As Clerk of Local Board No. 130, she is legal custodian of the original Selective Service file of John Henry Hacker. [2*]

"4. The Selective Service file of John Henry Hacker is a record kept in the normal course of business by Local Board No. 130, and it is the normal course of Local Board No. 130's business to keep such records.

"It is Further Stipulated that a photostatic copy of the original Selective Service file of John Henry Hacker, marked 'Government's Exhibit 1' for identification, may be introduced in evidence in lieu of the original Selective Service file of John Henry Hacker.

"Dated this 4th day of August, 1953."

Signed by myself on the part of the Government, by Mr. Shire as attorney for the defendant, and by the defendant himself, your Honor.

We ask it be marked as Government's Exhibit 1-A for identification. And, pursuant to stipulation, we move that Government's 1 and 1-A for identification be introduced into evidence at this time.

The Court: All right, they may be received.

Mr. Real: With that evidence the Government will rest its case, your Honor.

Mr. Shire: I should like to call Mr. Hacker to the stand briefly, your Honor.

The Court: Very well. [3]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Defendant's Case in Chief

JOHN HENRY HACKER

also known as John Henry Wilson, the defendant herein, called as a witness in his own behalf, being first sworn, was examined and testified as follows.

The Clerk: Your full name, please.

The Witness: My full name is John Henry Wilson.

The Clerk: Your full name is John Henry Wilson?

The Witness: That is my true name.

The Clerk: Your true name.

The Witness: That is the legal name.

The Clerk: Thank you.

The Witness: Also known as John Henry Hacker.

Direct Examination

By Mr. Shire:

Q. And you are known as John Henry Hacker?

A. That is right.

Q. And when you filed with the Selective Service System you also put "aka Wilson," also known as Wilson, is that right? A. That is true.

Q. What is the reason that you use the name Hacker?

A. When I was quite young, about five years old, my mother was remarried to Mr. Hacker, Haskell W. Hacker, and he is my stepfather and I have used my stepfather's name. The [4] legal complete proceedings were not finished, shall I say,

(Testimony of John Henry Hacker.)

for adoption, and for that reason my legal name is Wilson.

Q. How old are you, Mr. Hacker?

A. 20 years old.

Q. You are a member of the Jehovah's Witnesses, is that correct?

A. I am a Jehovah's Witness.

Q. Well, that is a group, is it not?

A. That is a group of witnesses to the most high God, Jehovah.

Q. And the legal governing body is the Watchtower Bible & Tract Society, located in Brooklyn, New York, is that correct?

A. That is correct.

Q. Did you inform your board that you were what is known as "a pioneer"?

A. I did.

Mr. Shire: I believe the record so reflects, your Honor.

Q. What is a pioneer?

A. A pioneer minister—

Mr. Real: Your Honor, I will object as irrelevant and immaterial to the issues of this case.

The Court: Well, it may be, but he may answer. Go ahead.

A. A pioneer minister is a full-time minister of Jehovah's Witnesses and devotes a minimum of 100 hours a month to full-time preaching in the territory assigned to him, under [5] the direction of our governing body, the Watchtower Bible & Tract Society.

(Testimony of John Henry Hacker.)

Q. (By Mr. Shire): Are you also the company servant of your congregation?

A. I am the congregation servant.

Q. You are the congregation servant?

A. That is true.

Q. What does the congregation servant do?

A. The congregation servant has oversight of the group of Jehovah's Witnesses that form the congregation in his locality. He is the overseer, or the superintendent, or the minister of that congregation.

Q. What do you call your churches?

A. Our churches are called Kingdom Halls.

Q. Do you have a Kingdom Hall for your congregation? A. We have a Kingdom Hall.

Q. Where is it located?

A. It is located at 229 Desert Avenue in Ontario.

Q. Have you had a Kingdom Hall from October or November 1952, to the present time?

A. We have.

Q. Have you been their company servant?

A. Since that time I have been the congregation servant.

Q. Have you been a pioneer? [6]

A. I have been a pioneer since November the 1st, 1950.

Q. Have you performed any certain services for the members of your congregation?

A. I have performed a funeral service for one member of our congregation who died, and that is recorded in my file in newspaper clippings.

Q. Is that a Spanish congregation?

A. That is a Spanish congregation.

(Testimony of John Henry Hacker.)

Q. Do you speak Spanish?

A. I speak Spanish fluently.

Q. How many members do you have in your congregation?

A. We have 31 Jehovah's Witnesses and approximately seven or eight persons of interest that attend our meetings.

Q. Do you conduct the service?

A. I conduct the meeting.

Q. In the commonly accepted sense of the word, as a minister are you the one who has the flock you administer to?

A. That is right.

Mr. Real: Your Honor, I will object to the answer as a conclusion of the witness.

The Court: It may remain.

Mr. Shire: May I present these to the witness, your Honor?

Q. I will show you some documents and ask you if you know what they are?

A. These are invitations to public talks that we have [7] given, which have been delivered.

Mr. Real: We stipulate those may go in evidence, your Honor.

Mr. Shire: Thank you. May these be received in evidence? They show the name of Mr. Hacker as the company servant.

The Witness: Those are in Spanish.

Mr. Shire: As one exhibit.

The Clerk: It will be Defendant's Exhibit A in evidence.

Q. (By Mr. Shire): Do you have any outside work?

(Testimony of John Henry Hacker.)

A. At the present time I have no outside secular employment. I did, however, during the period.

Q. And you earned \$640 in one year, is that right?

A. That is correct; in the year 1951, I earned \$640.

Q. You drove a school bus? A. Part time.

Q. An hour to an hour and a half in the morning, five days a week only?

A. Five days a week only, and not during the summer.

Q. Not during the summer?

A. Not during the summer, I did not work.

Q. Did you have any other employment?

A. I had no other employment.

Mr. Shire: May I have Exhibit 1, if your Honor pleases? I should like permission to show a certain portion to the witness, if your Honor pleases. [8]

The Court: You may.

Q. (By Mr. Shire): At page 35, the minutes of the meeting of the Selective Service Board. Will you read this over, Mr. Hacker, please? This is page 35 of Exhibit 1, the minutes of the meeting of the Selective Service Board. Did you read it?

A. Yes.

Q. Are those minutes substantially correct?

A. No, they are not.

Q. Will you relate in what way those minutes are incorrect? What took place at the personal appearance?

A. A great deal of this information that is con-

(Testimony of John Henry Hacker.)

tained in here, shall I say, is difficult, and besides that——

Mr. Real: Your Honor, I move to strike his difficulty.

The Court: It may be stricken.

Mr. Shire: It may be stricken. It is not responsive.

Q. Will you relate what took place, please?

A. In my own words?

Q. Yes, sir.

A. I believe in the evidence I submitted to the board to substantiate my claim for the ministry, on page 1—that is page 18 in this document—there is an outline of the material I presented to them. And if the judge or they can compare the two and see how that the minutes of the board compares with the outline that I have presented to them. I submitted my claim for a minister's classification. I [9] made mention of the fact that I was devoting my full time as my vocation to the ministry work as a fulltime pioneer.

I also related that I was the presiding minister of the Chino congregation of Jehovah's Witnesses. And certain questions were asked to me by the board other than what is found in this outline on page 1 that I wish to submit the evidence.

Q. What did they ask you and what was your answer that does not appear there?

A. One question that was asked me that is not here was why did we not salute the flag? And why did we, as a group, refuse to perform military serv-

(Testimony of John Henry Hacker.)

ice for the Government? And also, was it not true that we sold our literature; that it was a commercial work?

I answered and said that I believed that such questions had no bearing on my case or the ministry. And that then, I believe Mr. Dickey or Hickey, I believe his name was, said: "Well, for his own information would you answer his question?" which I did. That is not found in those minutes of the board.

Q. In other words, they went into religious belief; they asked you what you believed on certain things and why?

A. That is right. And also, I notice here on this minute information is not included. For example, they did not put down the time of our meeting. I explained to them that we conduct regular meetings at the Kingdom Hall three times a week, and the time of these meetings are not found [10] in the minutes of this hearing.

Q. Anything else?

A. Well, I notice that they have used expressions here. For example, I would like to read this one paragraph. And when I saw this paragraph at the board I immediately made an objection.

Q. Just answer the question, please.

A. Oh.

Q. Anything else that is not included in the minutes that you know of that took place?

A. Offhand, no.

(Testimony of John Henry Hacker.)

Mr. Shire: All right. I have finished questioning the witness.

Cross-Examination

By Mr. Real:

Q. When did you assume your formal appointment of the head of the congregation?

A. The formal appointment as head of the congregation?

Q. Yes.

A. I believe that the records show that it was in February of 1952, as head of the congregation. Is that correct? Check the records there. On the first page there is a certificate. Is that the one, the appointment? It is this one right here. There is a certificate. That is the pioneer minister.

Q. Is that the certificate you are referring to? [11]

A. That is right.

Q. That is the one that shows your appointment as the head of your congregation?

A. In other words, we are affirmed in the appointment. I was serving as head for a period of time before the appointment was affirmed.

Q. That is your initial appointment?

A. That is my initial appointment, is my pioneer assignment.

Q. That is at what date?

A. March 13, 1952.

Q. You were classified what date?

A. Classified as I-A on what date?

Q. Yes.

(Testimony of John Henry Hacker.)

A. The first time after my submission of the record?

Q. That is correct.

A. I will tell you in one minute. My first classification was—you know.

Q. Will you tell me, please?

A. Offhand, I can't tell you. I have to look in the file. It is listed here. My classification to I-A was mailed on February 28, 1952; so that was my first classification.

Q. Do you perform marriages, Mr. Hecker?

A. I have not performed marriages as of yet.

Q. Can you perform marriages? [12]

Mr. Shire: Well, now, just a moment. Do you mean under the laws of this state? There will be an objection to it as being ambiguous.

Mr. Real: I just asked him the question: can he perform a marriage?

Mr. Shire: I will object to that.

The Court: Well, a valid marriage.

The Witness: You asked me can I perform a marriage. Actually, marriage——

Mr. Shire: Just a moment, Mr. Hacker, just a moment.

The Court: Go ahead.

The Witness: Actually, marriages are not made by men. They are made between Almighty God and the pair that are to be united. And Christ has said, "What God has united together let no man sunder." The legality of marriage is before Almighty God.

(Testimony of John Henry Hacker.)

Q. (By Mr. Real): Then you cannot perform a marriage?

A. If you mean officiate at a marriage, yes; under the laws of our society I can; under the laws of this state you have to be 21.

Q. Under the laws of this state you cannot perform a marriage, is that correct?

A. In this state I have found that I cannot.

Mr. Real: That is all, your Honor. [13]

Redirect Examination

By Mr. Shire:

Q. Mr. Hacker, how long have you been a Jehovah's Witness?

A. I have been a Jehovah's Witness since 1942.

Q. Are your parents Jehovah's Witnesses?

A. My parents are Jehovah's Witnesses.

Mr. Shire: That is all, your Honor.

Mr. Real: One more question.

Recross-Examination

By Mr. Real:

Q. Mr. Hacker, when did you become a minister? A. In what way?

Q. When did you become a minister?

A. I became a full-time minister of Jehovah's Witnesses on November 1st, 1950.

Q. I asked you when did you become a minister?

A. Do you mean when I made a dedication of my life?

Q. Yes.

(Testimony of John Henry Hacker.)

A. The dedication of my life as a minister was made very early to the ministry, much as Samuel and Matthew and many of the other examples in the Bible; and that was in September of 1942, the dedication and baptism, of my life for the ministry.

Q. How old were you then?

A. At that time I believe I was nine years old. The [14] dedication was made then.

Mr. Real: Nothing else, your Honor.

Mr. Shire: I have no further questions.

The Court: That will be all.

Mr. Shire: We rest. If your Honor pleases, there is no rebuttal?

Mr. Real: There is no rebuttal.

Mr. Shire: I should like to present to the court a written motion for judgment of acquittal and file it at this time.

The Court: You may.

Mr. Shire: I have three cases, if your Honor pleases—four cases—that have been decided. The Sixth Circuit case of *United States v. Comodor* and *United States v. Niznik*. That is 184 Fed. (2d) 972. And *United States of America v. Walter Kobil*. I do not have the citation of that Eastern District of Michigan, No. 32390, September 13, 1951; and the *United States of America v. Stephen Knodis*, United States District Court, District of New Hampshire, No. 6216. These are similar cases, if your Honor pleases.

And in this case we have a question. The records

reflect that the draft board even sent the Form 111 to the Watchtower Bible & Tract Society, notifying them that an employee of theirs as a minister was being taken.

If I may point this out to the court in the cover sheet? [15] On July 21, 1952, "Mailed 110 to Registrant." That is notice that he was in I-A. And 111 to T. J. Sullivan of Watchtower. And the record reflects that T. J. Sullivan is the superintendent of ministers and evangelists for the Watchtower Bible & Tract Society. He is the one who certifies that Mr. Hacker was a pioneer and a minister.

I recognize, your Honor, that within the structure of the law many of the boys who claim to be ministers certainly do not come within the Act itself, but from the Act itself—Mr. Real brought a copy down—this man is actually a full-time minister and head of a congregation. He has the physical properties of the church, has an actual congregation that he administers to. And I submit, your Honor, that this man comes directly within the law. There isn't any substantial basis for the draft board to have classified him other than as a minister. I cannot possibly see anything in the files.

The Court: What is your view, Mr. Real?

Mr. Real: Your Honor, I submit that the only question here is whether or not there actually was any arbitrary or capricious conduct on the part of the board; or whether there is any basis in fact in the file for the determination as to whether or not this particular defendant is a minister as he claims.

Now, certainly we realize that a claim for defer-

ment is a claim that must be substantiated by the claimant himself. [16] It is not something that is placed upon the board to establish, whether or not he is a minister.

I submit to your Honor, that up until the time of March 13, when the defendant had already been classified in I-A and was being processed at the time on his claim, that until that time he was not appointed. He was then appointed by this Society to so serve on March 13th as a visiting minister of the Chino, California, congregation.

I submit that even though we have a question as to whether or not the defendant was a minister at the time that the board met, that determination is a basis in fact on that as reflected in the minutes of the meeting.

Mr. Hickey asked him whether or not he could perform a marriage ceremony, which is one of the normal functions of a minister, and that he could not. The argument has been raised that the question is not a question as to whether or not a man is a minister under the laws of the state in which he lives or in which he is practicing his particular profession.

However, I submit that, let us assume an attorney from New York comes to California. He can say that he is an attorney, but certainly he cannot practice law in California without having passed the State Bar, and therefore, any functions that he may claim as a lawyer in California are worthless to him in this particular state. [17]

I think we have an analogous situation here. Here

is a man who claims to be a minister and yet he cannot perform the functions of a minister in this particular state because of his youth. I think that that is sufficient basis for the board to say you are or you are not a minister. In this case they said, "no," and therefore I think under the holding of the Cox case the only question is as to whether or not there was a basis in fact. The Government submits there was and therefore the defendant must be found guilty as charged.

The Court: Was that the sole basis?

Mr. Real: Assuming it was the sole basis, your Honor.

The Court: I say, does the record show that? I do not know.

Mr. Real: The record does not show that particular thing. They did not point that out as a basis of fact in pointing out a basis. I would say that that could be a basis in fact for the classification, no matter how that weighs in. It is not a question of weight. It is a question whether or not, even though there is minutely a basis, there is a basis in fact.

Mr. Shire: I should like to read from the Niznik and Comodor cases, 184 Fed. 2d 972. The court says there:

"Although the members of the draft board performed long, laborious, and patriotic duties, nevertheless, the ruling in this regard, that appellants were not entitled to classification as ministers [18] of religion, was based not upon the evidence or information in appellant's files, or upon a belief in the truthfulness of the statements made by appellants,

but upon the fact that they were members of Jehovah's Witnesses. The regulation pertaining to ministerial classification in this case was plain.

“ ‘(a) In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion * * *

“ ‘(b) A regular minister of religion is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.’ Section 622.44 of the Selective Service Regulations.”

The court goes on to say:

“Disregard of this provision, and refusal to classify as a minister of religion solely on the ground that appellants were members of a religious sect and that they had not attended a religious seminary and had been regularly ordained, was arbitrary and contrary to the law and regulations.”

And then quoting from the regulations again, the court [19] says.

“ ‘In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice.’ Section 623.1(c) of the Selective Service Regulations.

“The classification of the Local Board, accordingly, was invalid, and its action void. The judg-

ments are, therefore, reversed, the convictions are set aside and appellants are discharged.”

Your Honor, the argument of the Government in selecting one thing such as this—these boys register at the age of 18—to say that because of the California law, no one can perform a marriage ceremony until they are 21, that he is not a minister, is not within the Act. The Act does not say anything about that, and I submit that he comes clearly within the Act.

Not only does he come within the Act technically, I say that what we know as fair and honest men, that this man is a minister. He is not just one who says: Well, I belong to a certain group and all of us are ministers, and therefore I am a minister. But he actually has a congregation, and it is reflected by the members of the congregation who sign their [20] names as being members of the congregation.

And I say that he has been their minister for some years and it is reflected by the fact that they actually have a church where he regularly preaches, where his name is out in front, where they publish material saying that he is the minister.

It is actually reflected by the fact that he devotes his full time to that church and that congregation. And I submit, your Honor, that he comes absolutely within the meaning of what we know as a minister or a head of a church, and within the meaning of the Act certainly.

The Court: Are those cases to be found any place except in those advance slips?

Mr. Shire: Well, I just have these, your Honor. I presume they are in the books.

The Court: You have the memorandum, I believe.

Mr. Shire: I do not have a memorandum in this case.

The Court: I thought you said you had a trial memorandum.

Mr. Shire: On the Boyd case. I considered this was a question of fact. I shall be happy to submit a memorandum within a very short time.

The Court: Give me the cases that you cited there a few moments ago.

Mr. Shire: 184 Fed (2d) 972 is the Niznik and Comodor cases. I do not have the citation for the United States of [21] America vs. Walter Kobil, the Eastern District of Michigan, September '51. The case of United States of America v. Stephen Konides, District of New Hampshire—I have not run these cases down, your Honor.

Mr. Real: I think they are in 107 Fed. Supp. I am not positive.

The Court: In which volume?

Mr. Real: 107 Fed. Supp., I think.

Mr. Shire: I will be very happy to run them down, your Honor, and digest them.

The Court: All right. You do that and I will rule on this case next Monday at 1:30.

Mr. Shire: If your Honor pleases, I have got to be at San Diego for trial.

The Court: Well, a week from Monday.

Mr. Shire: Pardon?

The Court: A week from Monday, then.

Mr. Shire: On the 17th.

The Clerk: Monday is the 17th.

Mr. Shire: I will submit these just as rapidly as possible, your Honor, and give Mr. Real a copy.

The Clerk: What time on that, your Honor.

The Court: Better make it 1:30 in the afternoon. I might be in the trial of a case.

(Whereupon a recess was taken until 1:30 p.m., Monday, August 17, 1953.) [22]

August 26, 1953—1:30 o'Clock P.M.

The Clerk: No. 22875-Criminal, United States vs. John Henry Wilson, charged as John Henry Hacker, for ruling on motion for judgment of acquittal.

The Court: That motion will be denied.

The defendant will be found guilty as charged in the Indictment.

Mr. Shire: If your Honor please, I have a motion for a new trial, a copy of which I am serving on the United States Attorney, and I would like to file it with the court.

(Mr. Shire filed a written Motion for a New Trial with the Clerk.)

And pending the time set for hearing on this Motion, if your Honor please, I wonder if the defendant may be referred to the Probation Department, so that his situation may be presented to the Court properly prior to sentence, and I wonder if the defendant may be released on the same bond pending that motion?

The Court: All right. I don't think the Proba-

tion Department is very busy at this time, so sentence will be imposed in this case next Monday morning. Well, I think [25] we better make it at 1:30. Will you be here at 1:30, Mr. Real?

Mr. Real: Yes, your Honor.

The Court: All right.

The Clerk: The 31st?

The Court: Yes.

The Clerk: Today is Wednesday.

The Court: That is right. I will have to postpone it. That will have to be on the 8th, then, at 1:30, the 8th of September.

Mr. Shire: And will the hearing on the motion for a new trial be held at that time also, your Honor?

The Court: Yes. [26]

Tuesday, September 8, 1953—1:30 P.M.

The Court: You may proceed.

The Clerk: United States v. John Henry Hacker, No. 22875.

Mr. Real: Ready for the Government.

Mr. Shire: Ready for the defendant.

The Court: You may proceed.

Mr. Shire: If your Honor pleases, the matter resolves itself into this. It is our contention that there was no substantial evidence in the Selective Service file to contravert the evidence and the contentions of the defendant that he was and is a minister in fact.

Now, we have previously discussed the section in the regulations.

Any standard set up by the U. S. Attorney in

arguing this matter, your Honor, that he isn't able to perform a marriage by reason of his age is answerable in this fashion.

First, the regulations set forth no such standard. They do not say that a minister who is able to perform a marriage within the state is exempt. They say a minister or one who has that following or that calling regularly performs such services.

Next, if the Congress of the United States intended that any such standard be set up it would be set forth in the Act, [28] if your Honor pleases, and it is not set forth in the Act.

I know of no other contention that the United States Attorney had in the case. I have examined the file carefully and I find no other evidence but that he was in fact a minister.

Now, I do not know by what legal reasoning the draft board could have arrived at that conclusion, that he was not in fact a minister; and I present to your Honor this: Here in this court could it be said, your Honor, that a man who is in fact a minister, who has a congregation, who has a church and regularly preaches to them as the Act sets forth, meets all the standards and having presented that to the draft board could it then be said that in fact he is not a minister.

Now, there is the point of our contention there is no substantial evidence or in fact any evidence whatsoever that he didn't—that he isn't a minister and he should have been classified as such and therefore there is a violation of the regulations—a violation of due process.

Mr. Real: Your Honor heard the arguments on the question as to whether or not the defendant is a minister. We don't have to go into that again.

This is a motion for a new trial. We will submit the motion.

The Court: As I stated once before if the matter were originally before me I might hold the defendant was a minister [29] but it is out of my hands. So, the motion for a new trial will be denied.

Have you seen the pre-sentence report, counsel?

Mr. Shire: No, your Honor, I have not, but I talked to the probation officer and understand what went into it, so I do not deem it necessary to read it after having talked with him.

The Court: All right.

Mr. Shire: Your Honor, I should like to be heard on the matter of sentence.

The Court: Very well.

Mr. Shire: If your Honor please, I respectfully disagree with your Honor as to whether or not your Honor could examine the file and determine there was not substantial evidence. But I respect your Honor's decision and I urge your Honor now to do this, in this case with this man. I believe the draft board was wrong. I am not a Jehovah's Witness. But I can see the viewpoint of this man and I can see how the draft board is wrong with him.

He in fact is not just a publisher or minister in a congregation but is the leader of a congregation and a minister to these people.

I urge that your Honor grant this man proba-

tion. I do not know how the people around there like him or like his congregation. I understand there are some derogatory remarks made, but that is not a question before this court. I believe [30] that he is entitled to his religion and we are entitled to ours.

He has no criminal record. He has never done anything wrong. He has led a good life and a Christian life and a decent life. I believe that the draft board was wrong, your Honor. Your Honor has it within your power to correct that wrong by leniency and mercy and I so request your Honor and ask for that in his behalf.

The Court: I doubt that he is entitled to probation. Will you please stand up? Is there anything you would like to say before sentence is imposed on you?

The Defendant: No, except, your Honor, I have the duty and obligation to minister to my congregation and I have done that.

The Court: You will be committed to the custody of the Attorney General for two years.

Mr. Shire: If your Honor please, may I have just a moment? It is my desire in this case to file a notice of appeal and if your Honor please, I move the court for a bond in the amount of \$2,500 and ask that the defendant be released pending the result of the appeal and during the appeal upon that bond.

The Court: All right.

Mr. Shire: Now, may there be a stay of execu-

tion for 24 hours until I file the necessary papers?
The Court: Yes.

(Whereupon the above-entitled matter was concluded.)

[Endorsed]: Filed, October 2, 1953. [31]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 21, inclusive, contain the original Indictment; Waiver of Jury; Motion for Judgment of Acquittal; Motion for a New Trial; Judgment and Commitment; Notice of Appeal and Designation of Record on Appeal and a full, true and correct copy of Minutes of the Court for June 1 and 22, August 4, 17 and 26 and September 8, 1953, which, together with the original exhibits in the case and Reporter's Transcript of Proceedings on August 4 and 26 and September 8, 1953, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$3.20 which sum has been paid to me by appellant.

United States Court of Appeals
Ninth Circuit

No. 14072

JOHN HENRY HACKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

POINTS UPON WHICH APPELLANT WILL
RELY, PURSUANT TO RULE 17 (6);
DESIGNATION OF RECORD MATERIAL
TO CONSIDERATION

The points upon which the appellant will rely in substance are:

1. The denial of the ministerial exemption is arbitrary, capricious and without basis in fact, for the uncontradicted and unimpeached documentary evidence in the draft board file shows that petitioner (appellant) pursued his ministry as his vocation.

2. Failure of the local board to make a full summary of the oral evidence given by appellant upon personal appearance concerning the reason why Jehovah's Witnesses do not salute the flag, and whether they sold literature and engaged in commercial work, deprived petitioner (appellant) of a full and fair hearing before the local board.

3. The fact that one cannot perform a marriage

service under the laws of the State of California is not a test of whether or not one is a minister within the meaning of the statute and the regulations exempting all ministers of religion.

4. Part-time secular activities performed incidental to the ministry do not remove one from the classification of "minister" within the meaning of the statute and the regulations exempting ministers of religion who preach as their vocation.

5. Appellant designates the following record which is material to the consideration of his appeal:

All of the reporter's transcript, together with all of the exhibits received in evidence or marked as an exhibit, together with the indictment, the minutes of June 1, 1953, June 22, 1953, August 4, 1953, August 17, 1953, August 26, 1953, September 8, 1953, waiver of jury, motion for judgment of acquittal, motion for new trial, notice of appeal, designation of contents of record on appeal, judgment and commitment.

Dated: October 15, 1953.

/s/ HAROLD SHIRE,
Attorney for Appellant.

[Endorsed]: Filed October 17, 1953.